This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 12/13/02.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MIGUEL MUNOZ,	)	
	)	**CHARGE: 1994CF1422**
	)	**EEOC NO: 21B940636**
Complainant,	)	
	)	**ALS NO: 10206**
	)	
and	)	
LABORERS' INT'L UNION #727	)	

Respondent.

RECOMMENDED ORDER AND DECISION

On October 27, 1997, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Miguel Munoz. That complaint alleged that Respondent, Laborers' International Union #727 (Union), discriminated against Munoz on the basis of national origin, alleging that from July 1993 and continuing, Respondent removed his name from the referral list, denied him employment referrals, and did not deny similarly situated non-Mexicans referrals for employment.

A public hearing was held on the allegations of the complaint on October 30th and 31st, 2001. An Agreed Motion to Extend Time to File Closing Briefs was granted on January 10, 2002; Complainant's Closing Brief was then due on February 15, 2002, Respondent's Reply Brief was then due on March 15, 2002, and Complainant's Reply Brief was then due on March 29, 2002. Another Agreed Motion to Extend Time to File Closing Briefs was granted on February 5, 2002; Complainant's Closing Brief was then

due on April 15, 2002, Respondent's Response Brief was then due on May 15, 2002, and Complainant's Reply Brief was then due on May 30, 2002. An additional Agreed Motion to Extend Time to File Closing Briefs was granted on June 3, 2002; Respondent's Response Brief was then due on June 15, 2002 and Complainant's Reply Brief was then due on June 30, 2002. A final Agreed Motion to Extend Time to File Closing Briefs was granted on July 12, 2002; Complainant's Reply Brief was then due, and was filed on August 2, 2002. This matter is now ready for decision.

Findings of Fact

1. Complainant is a Mexican-American male.

2. Respondent is a "labor organization" as defined by, and is subject to, the Illinois Human Rights Act.

3. Complainant was a member, in good standing, of Respondent during, but not limited to, 1992, 1993 and 1994.

4. At all relevant times, Respondent, its members and employers were subject to the North Central Illinois Laborers' District Council Articles of Agreement Covering Highway/Heavy Construction *(Complainant's Exhibit 5).*

5. At all relevant times, James Lawson was the Business Manager of Respondent and it was his responsibility to administer the union referral system, sending members to work for area construction contractors with whom Respondent had collective bargaining agreements.

6. Members of Respondent could notify Lawson or his secretary Marianne either in person or by telephone that they wanted to be placed on the referral list.

7. Members of Respondent were placed on the referral list and were referred according to the rules outlined in the North Central Illinois Laborers' District Council Articles of Agreement Covering Highway/Heavy Construction *(Complainant's Exhibit 5).*

8. The referral lists for the times relevant to the case at bar were discarded.

9. Complainant actively sought referral for employment from 1991 through 1996 from Respondent.

10. On May 3, 1993 Lawson removed Munoz's name from the referral list because Complainant refused an offer of work because had another job.

11. Complainant worked for a farm, and part time for CP Railway System in 1993.

12. Complainant has been employed full-time by CP Railway System since November 11, 1993.

13. If any member, of any race or national origin, refused a work referral, Lawson removed that person from the referral list. After such a removal, members of Respondent could notify Lawson or his secretary Marianne either in person or by telephone that they wanted to be placed back on the referral list.

14. Complainant was on the referral list in 1994.

15. Lawson referred Complainant to work for Majors Pipeline in Rock Falls, IL, in January 1994; that job was 2-3 days in length.

16. Lawson referred Complainant to a job on April 8, 1994; that job was 1 day in length.

Conclusions of Law

1. Complainant, Miguel Munoz, is an "aggrieved party" as defined by Section 1103(B) of the Illinois Human Rights Act.

2. Respondent, Laborers' International Union of North America No. 727, is a "labor organization" within the meaning of Section 2-101(D) of the Act.

3. The Illinois Human Rights Commission has jurisdiction over the parties as well as the subject matter.

4. Complainant failed to present a *prima facie* case of discrimination based upon national origin.

5. Respondent articulated a legitimate, non-discriminatory reason for its treatment of Complainant.

6. Complainant failed to prove by a preponderance of the evidence that Respondent's articulated reason was a pretext for national origin discrimination.

Discussion

Preliminary Matters

Respondent argues that the instant case is preempted by the Labor Management Relations Act (29 U.S.C. 185) because Complainant's case requires the interpretation of the collective bargaining agreement that was in force at the time in question, *(Respondent's Post Hearing Brief, at 1-2).* The proper inquiry here is whether this state action involves non-negotiable state law rights that are independent of any rights established by the collective bargaining agreement, or whether the evaluation of the claim is "inextricably intertwined with consideration of the terms of the labor contract", Kraft v. City of Peoria, et al., 177 Ill.App.3d 197, 531 N.E.2d 1106, 126 Ill.Dec. 479 (3rd District, 1988), citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985). This analysis was extended to include the issue of whether the Labor Management Relations Act preempts claims under the Illinois Human Rights Act, see, Lingle v. Norge Division Magic Chef, Inc., 486 U.S. 399 (1988).

In the case at bar, Munoz's discrimination claim has its origin in the public policy of Illinois and does not depend upon the existence of the collective bargaining agreement. In other words, the instant case action involves non-negotiable state law rights that are independent of any rights established by the collective bargaining agreement. The Act declares that the public policy of Illinois is "[to] secure for all individuals within Illinois the freedom from discrimination because of . . .national origin. . .in connection with employment, *(775 ILCS 5/1-102(A).* The fact that this tribunal must consider

Respondent's application of certain provisions contained in the collective bargaining agreement does not make Munoz's claim dependent upon that agreement, see, Lingle, *supra.* Therefore, the case at bar, brought pursuant to the Illinois Human Rights Act, is not preempted by the Labor Management Relations Act.

Next, at the close of the public hearing, Complainant made a motion to amend the pleadings to conform to the proofs (Tr. 220-221). Munoz seeks to amend the complaint to additionally include:

- On one or more occasions in 1993, Complainant asked James Lawson why Caucasian men were being sent out to work and not Mexicans;
- In July 1993 Lawson told Complainant that he was the next person to be sent to work, i.e. e., that Complainant was on the top of the referral list;
- Lawson told Complainant that he would be sending Mexicans to work in 1993 after the Dixon prison project begins because the State of Illinois requires it;
- In 1993 and thereafter Respondent referred non-Mexican, Caucasian workers to the Dixon prison project;
- Complainant was not referred to work after 1993 except for two days in January of 1994;
- Complainant continued to pay his union dues and sought work referrals from Respondent through 1997;

- Nothing in the governing referral clause of the Collective Bargaining Agreement authorized a member's removal from the referral list for refusing an offer of work or for working outside of the construction trade.

(Complainant's Proposed Findings of Fact and Conclusions of Law, at 17-18).

Commission Rule 5300.650 provides that a complaint can be amended prior to the close of the public hearing, for good cause shown. Complainant's showing of good cause amounts to his contention that the complaint was poorly drafted by the Illinois Department of Human Rights *(Complainant's Proposed Findings of Fact and Conclusions of Law, at 17-18).* Also, all of the evidence that Complainant seeks to add to the complaint was known to him years in advance of the public hearing.

Complainant seeks to amend at this late date to include facts that have been known to him for some time. Further, he can only state the complaint was poorly drafted, to demonstrate good cause. Complainant has failed to show good cause here; he could have amended the instant complaint much earlier than at the close of the public hearing. Therefore, his Motion to Amend the Complaint to Conform to the Proofs is denied, see, Ruyle and Greene County Manufacturing Co., Inc., et al., 1990 ILHUM LEXIS 19 (June 22, 1990).

Liability

The method of proving a charge of discrimination is well established. Complainant must establish a *prima facie* showing of discrimination. If he does so, respondent must articulate a legitimate, non-discriminatory reason for its actions. Then, in order for complainant to prevail, he must prove that respondent's articulated reason is pretextual. Zaderaka v. Human Rights Commission, 131 Ill.2d 172, 545 N.E.2d 684

(1989). Complainant alleges that from July 1993 and continuing, Respondent removed his name from the referral list, denied him employment referrals, and did not deny similarly situated non-Mexicans referrals for employment, *(Complaint, ¶6-7).* These allegations most closely resemble, and should be analyzed as, an allegation of failure to hire.

Typically, to establish a prima facie case of national origin discrimination in a failure to hire situation where another individual was selected from an initial pool of candidates, the Complainant is required to prove that: 1) he is a member of a group protected under the Act; 2) he applied and was qualified for the job for which Respondent was seeking applicants; 3) despite those qualifications, he was rejected; and 4) after the Complainant's rejection, a person with similar or lesser qualifications for the job and not in the Complainant's protected class was hired or, more appropriately in the instant case, a person further down on the referral list than Complainant and not in Complainant's protected class was referred to jobs, or a person not in Complainant's protected class was not stricken from the referral list when that individual refused a referral or was working another job, see, Singh and The Board of Trustees of The University of Illinois, 1996 ILHUM LEXIS 576, (August 16, 1996). In the case at bar, Complainant has failed to establish a *prima facie* case for discrimination based on national origin.

Complainant established the first three prongs of his *prima facie* case. It is an uncontested fact that Munoz is Mexican-American (Tr. 110). Also, Munoz has shown that he applied for, and was qualified to be referred to jobs by the Union. From July of 1993 to December of 1996, Complainant was a member of the Union in good standing (Tr. 46, 139). He went to the Union office frequently and asked for work. He also asked

to be placed on the referral list, from which the Union referred workers to different jobs (Tr. 113-14, 129-130).

Next, Complainant must show that despite being qualified, he was rejected, or more appropriately here, not referred to jobs by Respondent. The nature of construction work is such that workers are referred to jobs that last varying lengths of time. So despite the fact that Complainant was sent out on a job for Major Pipeline in Rock Falls, IL in January 1994 for three days and for an unknown company in April 1994 for one day, Complainant still established that he was not referred to jobs by Respondent. Being referred for four days out of one year is not fatal to Complainant's ability to establish the third prong of his *prima facie* case.

However, Complainant has not established the fourth prong of his *prima facie* case. Complainant failed to show that non-Mexican-Americans, with similar or lesser qualifications were referred to jobs ahead of him, or that non-Mexican-Americans were not stricken from the list when they held other jobs or refused referrals. Complainant states that he observed job sites to which other Union members had been referred. He testified that he observed non-Mexican Union members working on those jobs. But, he did not know whether those members were on the A or B list, and therefore above Munoz on the referral list and eligible to be sent out ahead of him; Munoz was on the C list[1], (Tr.

[1] The order in which Union members were to be referred to jobs is as follows:

. . .The Referral Office shall maintain the following lists on which persons in the construction and maintenance industry may register for referral. . .

(A) Group A – All persons who have been employed as a construction laborer for 180 days in the past two (2) years in the states of Illinois, Wisconsin, and Iowa and all graduates of the Illinois Laborers' and Contractors' Training Program within the last two (2) years.

(A) Group B – All persons who have been employed as a construction laborer for 90 days in the past one (1) year in the states of Illinois, Wisconsin, and Iowa.

141, 159-60). Also, James Lawson testified that he referred Caucasians who were on the C list to jobs between 1993 and 1995 (Tr. 65) and there is evidence that Complainant was near the top of the C list in 1993 (Tr. 288-289). But there is no evidence as to whether the Caucasians were recalled by the employers to which they were referred, and therefore, pursuant to the bargaining agreement, had the right to be called ahead of Munoz[2]. Similarly, Complainant has no evidence of non-Mexican-American people, who, unlike Munoz, remained on the referral list despite the fact that they were working other jobs or refused referrals (Tr. 163).

Complainant failed to establish that non-Mexican-Americans, who were below him on the referral list, were referred to jobs ahead of him, or were not stricken from the list when they held other jobs. Consequently, he has failed to establish his *prima facie* case.

> (A) Group C – All persons not qualifying for Group A and Group B above.
>
> . . .Registration and referral of such applicants shall be done by groups as set out above. Each applicant shall be registered in the highest group for which he qualifies and registrants in Group A shall be first referred, then Group B and then Group C in that order.
>
> The name of a registrant so dispatched shall be stricken from the list if the job to which the registrant is dispatched lasts long enough for the dispatched registrant to receive two (2) days' pay at straight time if employed. . .

(Complainant's Exhibit 5, North Central Illinois Laborers' District Council Articles of Agreement Covering Highway/Heavy Construction Within the Jurisdiction of Local Unions 32, 109 and 727, Effective 6/1/90 through 5/31/95, Article III, Section 1-2).

[2] Employers may request former employees for referral to a job or project, in writing if requested by the Business Manager, and the Union Referral Office shall refer said former employees to the job or project, provided they are properly registered applicants in the Referral Office, are available for work at the time of the request, and have been employed by the requesting Employer under the terms of this or previous agreements in the geographic area of the Referral Office within thirty-six (36) months prior to the request; and provided further that no employees shall be laid off or discharged to make room for such former employees. . .

(Complainant's Exhibit 5, North Central Illinois Laborers' District Council Articles of Agreement Covering Highway/Heavy Construction Within the Jurisdiction of Local Unions 32, 109 and 727, Effective 6/1/90 through 5/31/95, Article III, Section 4).

Even if Munoz had established his *prima facie* case, he has not shown that Respondent's non-discriminatory reason for its actions is pretextual. Lawson testified that he removed **all** members from the list, regardless of national origin, who were working other jobs (Tr. 52-59, 64, 282-284). This is a non-discriminatory reason that explains why Complainant was stricken from the referral list and by extension, it explains Complainant's dearth of referrals; Complainant worked non-union jobs at a farm in 1993 and at CP Railway System from 1993 to present, (Tr. 131, 137, 162, 272). Complainant offered no evidence that would indicate that Respondent's explanation regarding its treatment of him is pretextual.

When viewing the evidence in its totality, Complainant may have shown that his removal from the referral list violated the collective bargaining agreement. The collective bargaining agreement states that members who refuse referrals are placed at the bottom of the list, not stricken from it[3]. But Complainant has not shown that his removal violated the Illinois Human Rights Act.

Finally, Complainant cites several cases to support his contention that all legitimate reasons for the Union's actions have been eliminated, so this tribunal should infer discrimination because Respondent failed to produce 1992, 1993 and 1994 referral lists and failed to call certain witnesses at the public hearing. However, this tribunal cannot make that inference because Complainant is required to first establish his *prima facie* case, see, e.g. Royal v. Bongi Cartage Company, 33 Ill. HRC Rep. 459 (1987), Jones v. Michael Reese Hospital, 35 Ill. HRC Rep. 126 (1987). In the instant case, Munoz failed to establish a prima facie case, so the cases he cites are inapposite. Also,

[3] (Complainant's Exhibit 5, North Central Illinois Laborers' District Council Articles of Agreement Covering Highway/Heavy Construction Within the Jurisdiction of Local Unions 32, 109 and 727, Effective 6/1/90 through 5/31/95, Article III, Section 7).

Complainant appears to argue that the testimony of Respondent's witnesses was incredible, therefore this tribunal should infer discrimination for this reason. However, this tribunal finds that Respondent's witnesses were indeed credible, so this argument fails as well.

Recommendation

Based upon the reasons stated above, I recommend that the instant complaint and underlying charges of discrimination against Laborers' International union of North America No. 727 be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

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BY:

WILLIAM H. HALL, IV
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: November 1, 2002